(3)

No. 99-1870

Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

IN THE

Supreme Court of the United States

EMILY ADLER, *et al.*,

Petitioners,

v.

DUVAL COUNTY SCHOOL BOARD, *et al.*,

Respondents,

v.

SUSAN BOLES, *et al.*,

Respondents-Intervenors.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS'-INTERVENORS' BRIEF IN OPPOSITION

Jerry Falwell, Jr.
Va. Bar No. 27396
LIBERTY COUNSEL
P.O. Box 542
Forest, VA 24551

Mathew D. Staver
(Counsel of Record)
Florida Bar No. 0701092
Erik W. Stanley
Florida Bar No. 0183504
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, Florida 32750
(407) 875-2100

39 pp

QUESTIONS PRESENTED

1. Whether a content-neutral policy that allows one or more student volunteers elected by the graduating senior class to deliver a message at the beginning and/or conclusion of the graduation ceremony, which message is not pre-reviewed, censored, edited, or directed by school officials and which message can be secular or religious in nature, violates the Establishment Clause.

2. Whether a content-neutral policy that creates a limited public forum for student speech at a high school graduation ceremony during which the student speaker may address any topic, including controversial secular and religious subject matters, violates the Establishment Clause.

3. Whether an injunction requiring school officials to censor all religious content of a message given by one or more volunteer students of the senior class at a high school graduation ceremony at a time and place where uncensored student-initiated, student-led secular speech is permitted violates the Establishment Clause.

4. Whether an injunction requiring school officials to censor all religious content of a message given by a volunteer student of the senior class at a high school graduation ceremony at a time and place where uncensored student-initiated, student-led secular speech is permitted violates the student's right to freedom of speech.

5. Whether an injunction requiring school officials to censor all religious viewpoint of a message on an otherwise includable topic given by a volunteer student of the senior class at a high school graduation ceremony violates the student's right to freedom of speech.

PARTIES

The Petitioners consist of past and current students of various schools within the Duval County School District, and they include the following: Emily Adler, Bonnie Bear, Aaron Finck, Benjamin Finck, Rachel Finck, Seth Finck, Tyler Hurley, Monica Juodvalkis, Lucy Nord, Roberta Nord, Jonathan Rand, and Joshua Weihnacht.

There are two categories of Respondents. The Respondents include the Duval County School Board and the Duval County Public School District.

The Respondents also include various student-intervenors who attend schools within the Duval County Public School District. These students and parents moved to intervene as Defendants-Intervenors and are listed below before the Eleventh Circuit Court of Appeals as Movants-Intervenors and herein as Respondents-Intervenors. These Respondents include Susan Boles, Ronald Boles, Rebecca Boles, Mark Muhlbauer, Kenneth Carkhuff, Karlene Carkhuff, Ashton Carkhuff, Stan Carter, Susan Carter, Sarah Carter, Mark Sciullo, Jody Sciullo, Moriah Sciullo, Nicholas Sciullo, Douglas Pigg, Charlotte Pigg, Jonathon Pigg, and Tim Howard.[1]

---

[1] Petitioners' Petition for Writ of Certiorari listed the Respondents-Intervenors in a footnote. However, the undersigned has represented student-intervenors in this case since the 1993 initial cause of action and the student-intervenors through the undersigned presented arguments on the merits in the present cause of action before the Eleventh Circuit Court of Appeals in 1998 and again before the *en banc* panel in 1999. The *en banc* panel of the Eleventh Circuit Court of Appeals requested the Respondent-Intervenors to address two substantive questions addressed on appeal, namely whether the Guidelines on their face violated the Establishment Clause and whether injunctive relief is a workable remedy under the facts of this case.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

REASONS FOR DENYING THE WRIT 8

I.

CENSORING STUDENT-INITIATED, STUDENT-LED RELIGIOUS SPEECH AT A HIGH SCHOOL GRADUATION WHERE STUDENTS ARE PERMITTED TO DELIVER ANY MESSAGE OF THEIR CHOICE VIOLATES THE FREE SPEECH CLAUSE 10

A.

Content Censorship of Student-Initiated And Student-Led Religious Speech In A Limited Public Forum Is Unconstitutional. 11

B.

Viewpoint Censorship Of Student-Initiated And Student-Led Religious Speech In A Non-Public Forum Is Unconstitutional. 18

II.

THE GUIDELINES ARE CONTENT-NEUTRAL AND COMPORT WITH THIS COURT'S DECISION IN *SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE* 22

III.

THE CONTENT-NEUTRAL GUIDELINES WHICH ALLOW UNCENSORED STUDENT MESSAGES DO NOT CONFLICT WITH *LEMON V. KURTZMAN* OR *LEE V. WEISMAN* 24

A.

The Guidelines Do Not Violate *Lemon v. Kurtzman.* 24

1. The Purpose Of The Guidelines Is Secular 24

2. The Guidelines Do Not Have The Primary Effect Of Advancing Or Endorsing Religion 26

3. The Guidelines Do Not Excessively Entangle The Government With Religion 27

B.

The Guidelines Do Not Violate *Lee v. Weisman* 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: **PAGE**

ACLU of New Jersey v. Black Horse Pike Regional Bd. of Educ.,
84 F.3d 1471 (3rd Cir. 1996) (en banc) 8

Adler v. Duval County School Bd.,
851 F. Supp. 446 (M.D. Fla. 1994), *aff'd in part, vacated in part, and remanded in part*,
112 F.3d 1475 (11th Cir. 1997) 2, 3

Adler v. Duval County Sch. Bd.,
174 F.3d 1236 (11th Cir. 1999), *rev'd by*
206 F.3d 1070 (11th Cir. 2000) (en banc) 5

Adler v. Duval County School Board,
206 F.3d 1070 (11th Cir. 2000) (en banc) ..... 5, passim

Bd. of Educ. of Westside Community Sch. v. Mergens,
406 U.S. 226 (1990) 14, 15, 17, 25, 26

Bethel School District v. Fraser,
478 U.S. 675 (1986) 16

Board of Regents v. Southworth,
120 S. Ct. 1346 (2000) 9, 22

Brody v. Spang,
957 F.2d 1108 (3rd Cir. 1992) 13

Capitol Square Review & Advisory Bd. v. Pinette,
515 U.S. 753 (1995) 14, 17, 24

Chandler v. James,
180 F.3d 1254 (11th Cir. 1999) 15, 16, 17, 21, 27

City Council of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 19

City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n.,
429 U.S. 167 (1976) 12

Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.,
473 U.S. 788 (1985) 12, 18

Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos,
483 U.S. 327 (1987) 25, 28

Cox v. Louisiana,
379 U.S. 536 (1965) 15

Doe v. Madison Sch. Dist. No. 321,
147 F.3d 832 (9th Cir. 1998), *vacated on other grounds*, 177 F.3d 789 (9th Cir. 1999) (en banc) 9, 25

Forsyth County v. The Nationalist Movement,
505 U.S. 123 (1992) 15

Frisby v. Schultz,
487 U.S. 474 (1988) 12, 15

Gregoire v. Centennial Sch. Dist.,
907 F.2d 1366 (3d Cir. 1990) 13

Harris v. Joint Sch. Dist. No. 241,
41 F.3d 447 (9th Cir. 1994), *vacated as moot*,
515 U.S. 1154 (1995) 9

Heffron v. ISKCON,
452 U.S. 640 (1981) 12

Jones v. Clear Creek Ind. Sch. Dist.,
977 F.2d 963 (5th Cir. 1992) 1, 8, 23

Keyishian v. Bd. of Regents,
385 U.S. 589 (1967) 15

Lamb's Chapel v. Center Moriches Union Free School Dist.,
508 U.S. 384 (1993) 18, 19, 24

Lee v. Weisman,
505 U.S. 577 (1992) ..... 4, passim

Lemon v. Kurtzman,
403 U.S. 602 (1971) 3, 6, 10, 24, 25

Lundberg v. West Monona Community Sch. Dist.,
731 F. Supp. 331 (N.D. Iowa 1989) 13

Lynch v. Donnelly,
465 U.S. 668 (1984) 26

New York Times Co. v. Sullivan,
376 U.S. 254 (1963) 15

O'Hair v. Andrus,
613 F.2d 931 (D.C. Cir. 1979) 21

Perry Educational Ass'n. v. Perry Local Educator's Ass'n.,
460 U.S. 37 (1983) 12, 15

Police Dep't v. Mosley,
408 U.S. 92 (1972) 15

Rosenberger v. Rector & Visitors of the University of Virginia,
515 U.S. 819 (1995) 14, 19

Santa Fe Independent School District v. Doe,
2000 WL 775587 (U.S. June 19. 2000) ..... 8, passim

Tinker v. Des Moines Indep. Community Sch. Dist.,
393 U.S. 503 (1969) 11

Torcaso v. Watkins,
367 U.S. 488 (1961) 21

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994) 17

United States v. Kokinda,
497 U.S. 720 (1990) 12, 15

Widmar v. Vincent,
454 U.S. 263 (1981) 12, 14, 19, 25, 26, 27

RULES:

FED.R.CIV.P 65(a)(2) 4

OTHER AUTHORITIES:

McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (Winter 1992) 27

STATEMENT OF THE CASE

This case involves a facial challenge[2] to certain Guidelines within the Duval County Public School District (hereafter "Board") which address student-initiated, student-led messages at graduation ceremonies in Duval County. In the spring of 1993, Dr. Larry Zenke, Superintendent of Schools for Duval County, asked Vicki R. Reynolds, Duval County School Board's Liaison for Legal Affairs, to look into the issue of student messages during graduation ceremonies by consulting with the General Counsel's Office. Ms. Reynolds initiated a legal request to the General Counsel's Office and received a legal opinion from that office in April, 1993. This opinion took the policy approved by the Fifth Circuit in *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), and made it neutral. Based on that opinion, Ms. Reynolds issued the memorandum of May 5, 1993, to all high school principals. That memorandum (hereafter "Guidelines") states in pertinent part:

1. The use of a brief opening and/or closing message not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

---

[2] The original plaintiffs in *Adler* attended Mandarin High School. During the 1993 graduation ceremony, no student at Mandarin High School delivered a religious message. However, the facts in *Adler* revealed that of the seventeen high schools within Duval County, ten had a message with "religious" content or viewpoint and seven had either a secular message or no message.

> The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by school officials.

Ms. Reynolds testified that it was not her intent for the Guidelines to mandate student-led religious messages at graduations. Dr. Zenke testified that he did not have a purpose to violate the Constitution, to establish prayer or to favor prayer over any other message students might give. Dr. Zenke also stated that it would be inappropriate and impossible to prohibit or encourage prayer, because there is no prior review of the student messages.

On June 1, 1993, at the Board meeting, school board member Cheryl Donelan moved to have a moment of silence at graduation ceremonies in lieu of the suggested Guidelines. The motion failed by a vote of four to three. At least three school board members stated that they rejected Donelan's proposal in order to avoid (in their understanding) an impermissible mandated moment of silence. The Board members clearly desired to avoid the establishment of religion. Dr. Zenke stated that the Board was required to have a "hands off policy . . . to allow students to have their own message to communicate to fellow students." Dr. Zenke stated further that "students ought to have a very critical and whole role in that [graduation] program, both in planning and carrying it out."

In addition, Board members stated that the purpose and effect of the Guidelines was to allow the students to have free speech. Dr. Zenke stated, "I think the staff was trying to get clarification as to the latitude that students have in the issue as it relates to the first amendment."

In *Adler v. Duval County School Bd.*, 851 F. Supp. 446, 449 (M.D. Fla. 1994), *aff'd in part, vacated in part, and remanded in part*, 112 F.3d 1475 (11th Cir. 1997) (hereafter "*Adler I*"), the District Court found that,

> while the Reynolds' memorandum of May 5 was not itself the subject of any specific vote by the Board, that memorandum was left in force with the acquiescence or tacit approval of the Board as its official policy

governing the 1993 commencement exercises.

In early June 1993, following the Board meeting, the original plaintiffs, consisting of three graduating seniors from Mandarin High School and a parent of a graduating senior, brought an action seeking to enjoin the Duval County Public School District from *permitting* student-initiated, student-led messages containing religious content at the 1993 public high school graduation ceremonies. These plaintiffs also sought declaratory relief and damages. The undersigned counsel of record represented a separate group of students who were granted leave to intervene to oppose the claims of these original plaintiffs and assert their own first amendment rights of free speech. In *Adler I*, on June 4, 1993, after a hearing in open court, the original plaintiffs' Motion for Preliminary Injunctive Relief was denied. A renewed Motion for Injunctive Relief was also denied by written Order entered the following week. On January 3, 1994, the original plaintiffs filed a motion for class action determination in this case asserting that the interests involved affected students in all high schools throughout Duval County. On January 19, 1994, the motion for class action determination was denied as untimely.

The 1993 graduation ceremonies at the seventeen high schools within Duval Country School District were conducted according to the Guidelines. The District Court found:

> At ten of the seventeen high schools, it is undisputed that the students opted for messages that constituted various forms of religious prayer. At the remaining seven schools, however, it appears that either no messages were given at all, or that any that were given were entirely secular, having no religious aspects.

Adler, 851 F. Supp. at 449-50.

In *Adler I*, all parties, including the student-intervenors, moved for Summary Judgment, and on May 4, 1994, the District Court denied the original plaintiffs' motion and granted the Board's and the Intervenors' Motions. Judgment was entered in favor of the Defendants and the Intervenors and against plaintiffs. The District Court found that the Guidelines did not violate the Establishment Clause under *Lemon v.*

Kurtzman, 403 U.S. 602 (1971) or under *Lee v. Weisman*, 505 U.S. 577 (1992). The District Court also ruled that the graduation policy created a limited public forum for student messages and to censor the religious content of said messages would violate the student-intervenors' rights to free speech protected under the First Amendment.

The plaintiffs in *Adler I* appealed the ruling. The undersigned counsel of record, on behalf of the Intervenors, argued before the Eleventh Circuit Court of Appeals in 1995, and again in 1996, after the Court of Appeals requested the case be reargued. On May 6, 1997, the Eleventh Circuit Court of Appeals affirmed in part, vacated in part and remanded the case to be dismissed because the plaintiffs had graduated. *See Adler v. Duval County Sch. Bd.*, 112 F.3d 1475 (11th Cir. 1997). The Court found the damages claim had not been properly preserved, thus making the case moot.

This case now readdresses the same Guidelines challenged in *Adler I*. The complaint in this action was filed on Friday, May 15, 1998. The current Plaintiffs are new students who were not part of the decision in *Adler I*. Emily Adler is the sister of Karen Adler. Thus, the present case has the same name as the original matter. On May 27, 1998, the Respondents-Intervenors filed a Motion to Intervene. Respondents-Intervenors argued that a broad injunctions prohibiting all religious content or viewpoint would violate their freedom of speech in a limited public forum. On May 27, 1998, the District Court heard argument on Plaintiffs' Motion for Preliminary Injunction. At the hearing, all parties agreed that the facts of the case remained the same, that all of the evidence submitted in the *Adler I* case be made a part of the present proceeding, and all agreed that the case on the merits be advanced and consolidated with the hearing on the preliminary injunction under Fed.R.Civ.P 65(a)(2). On May 27, 1998, the District Court entered an Order denying Plaintiffs' motion and adopted the reasoning in *Adler I*. Also on May 27, the District Court entered an Order denying the Respondents-Intervenors' Motion to Intervene, stating the Motion was "DENIED AS MOOT given the entry of the contemporaneous Order denying the application for preliminary injunction and directing the entry of judgment." On May 28, Plaintiffs filed their appeal. On May 29, the Intervenors filed a Motion for Reconsideration of the District Court's denial of intervention requesting reconsideration. On May 29, the District Court denied the Motion

without prejudice to the right to be heard before the Eleventh Circuit Court of Appeals. On June 1, 1998, Respondents-Intervenors joined in the appeal. Plaintiffs and Respondents-Intervenors also filed Emergency Motions requesting an expedited appeal. On June 9, 1998, the Eleventh Circuit Court of Appeals granted an expedited appeal and consolidated the Respondents-Intervenors' case (Case No. 98-2720) with the Plaintiffs' appeal (Case No. 98-2709).

In August of 1999, this matter was again argued for the third time before the Eleventh Circuit Court of Appeals. On May 11, 1999, the Eleventh Circuit, in a 2-1 decision, found the Guidelines unconstitutional, in part because the Court ruled that students became state actors whenever they entered the graduation podium. On behalf of the Respondents-Intervenors, the undersigned counsel of record, along with the Board, filed separate Motions for Rehearing *en banc* which were granted on June 3, 1999, thus vacating the decision and setting the case for *en banc* oral argument. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999). The undersigned counsel of record then argued this case for the fourth time before a panel of twelve judges at the Eleventh Circuit Court of Appeals on October 19, 1999.

On March 15, 2000, the Eleventh Circuit Court of Appeals, sitting *en banc*, issued a ten to two ruling upholding the constitutionality of the policy. *See Adler v. Duval County School Board*, 206 F.3d 1070 (11th Cir. 2000) (en banc). The Court construed the appeal as an appeal of a final judgment strictly pertaining to the facial constitutionality of the Guidelines. *Id.* at 1073 n. 4. The Court found that the Guidelines, which permit graduating students to vote on whether to select a student to deliver a message wholly of his or her own choosing at the beginning or closing of a high school graduation ceremony, did not violate the Establishment Clause. The Court found the Guidelines were "perfectly consistent with the theme of neutrality in Establishment Clause jurisprudence." *Id.* at 1077. The Court noted that the Guidelines were "content-neutral, and allow an autonomous elected speaker, selected by her class, to deliver a religious or secular message on an equal basis." *Id.* Without deciding whether the Board had created a limited forum for student expression, the Court analogized the Guidelines to a line of open forum cases in which this Court held that "neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state

endorsement of religion." *Id.*

The *en banc* Court acknowledged that there was a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. *Id.* at 1071. The Court distinguished the Guidelines from other graduation "prayer" cases. Unlike other graduation "prayer" policies that only allow the choice of prayer or no prayer, the Guidelines in question allow the choice of a message, the content of which is solely up to the student. *Id.* at 1078-79. The Court rejected the argument that the students become state actors as soon as they participate in the graduation ceremonies, noting that such an argument would raise more free expression concerns and likely run afoul of the Free Exercise and Free Speech Clauses. *Id.* at 1080-81. The *en banc* panel found that the Guidelines did not violate this Court's *Lemon* or *Lee* tests. *See Adler*, 206 F.3d at 1083-91.

SUMMARY OF ARGUMENT

The Guidelines allow the students to decide whether to have a message at high school graduation, the content of which is left entirely to the student speakers. As such, the Guidelines have created a limited public forum for student speech. Within this forum the student volunteer can present a secular or religious message at his or her discretion. Under the Guidelines more than one student can present a message during the graduation ceremony. One student can present a message at the beginning and another at the conclusion of graduation. This opportunity is open for indiscriminate use by the student speakers to address any topic no matter how controversial. These messages need not comport with any predetermined outcome, and can either soothe or shock the conscience. The school remains aloof and uninvolved. Since the Board has allowed the student speakers to select their own topics, including controversial subject matters, the Board has created a limited public forum for student speech. Speakers can be excluded from this limited public forum only when the exclusion is necessary to serve a compelling interest.

Petitioners seek an injunction requiring the Board to censor student speech based solely on its content. Censorship of student speech for religious content is unconstitutional in a limited public forum.

Moreover, the Petitioners seek an injunction requiring the Board to censor student speech based solely on its viewpoint. Even if the Board had not created a limited public forum for student speech, an injunction censoring student religious speech would result in viewpoint censorship, which is unconstitutional even in a nonpublic forum. Under the Guidelines the students can speak on any topic. However, an injunction censoring religious speech would allow the students to speak on any topic except from a religious viewpoint.

This case does not involve a majoritarian vote for a religious message or the imposition of a religious exercise. The students never vote on the content of the message. The Guidelines are content-neutral. There is no predetermined or suggested outcome of the student speech. The students can speak or not speak, and if they choose to speak, they can speak on any topic. There is no requirement that the message be "appropriate" for graduation, and there is no direction in the policy as to the preferred message. The Board has completely removed itself from the message. The Board has opened a platform for student speech on any topic, even controversial subject matters. Moreover, the history of the Guidelines is content-neutral, and the only evidence regarding its application underscores the fact that the Guidelines have created a limited public forum

The Guidelines do not violate the Establishment Clause. The Guidelines are content-neutral. The purpose of the Guidelines is to allow secular and religious speech and allow students to direct their high school graduation. Moreover, the Guidelines do not have the primary effect of endorsing religion. Since the content of the message is left up to the individual student speaker, the Board has no idea what message will be presented. The message can be secular, sacred, profane or profound. The Board remains aloof and uninvolved. The Board does not mandate the content of the message and is detached from the message.

Requiring the Board to censor student messages by editing out religious content would violate the Establishment Clause by showing hostility toward religion and by creating excessive entanglement with religion. The Board would have to make doctrinal choices between what is and is not religious in order to censor the student's message.

The Guidelines are not coercive with regards to religious speech. The Board does not select the speaker, the content of the speech, and does not give any guidelines or encouragement on whether or how to say a religious message. Private religious speech has very little potential for coercion., and especially in the context where the Board remains aloof from the content of the message, there is no governmental coercion.

REASONS FOR DENYING THE WRIT

Respondents-Intervenors acknowledge that this case presents important and recurring questions regarding student speech at graduation ceremonies. In light of this Court's ruling in *Santa Fe Independent School District v. Doe*, 2000 WL 775587 (U.S. June 19. 2000), Respondents-Intervenors believe that this Court should consider granting certiorari to clarify the important First Amendment issues at stake. Respondents-Intervenors contend that this case presents a completely different set of facts than those addressed in *Santa Fe*, and further believe that the *en banc* panel correctly decided this case. If this Court grants the Writ, this Court should uphold the challenged Guidelines. The Guidelines are not about prayer but about speech. This case is unique from any other graduation "prayer" case decided by any other Circuit. It, therefore, does not conflict with any other circuit court ruling, nor with any ruling by this Court..

The Fifth Circuit in *Jones v. Clear Creek Independent. School District*, 977 F.2d 963 (5th Cir. 1992), upheld a policy where the only choice was to pray or not to pray, and if the student sought to pray, the prayer had to be non-sectarian and non-proselytizing. The Guidelines are fundamentally different from the *Jones* policy. The Guidelines, unlike *Jones*, do not mandate prayer. The outcome in *Jones* was predetermined. The outcome under the Guidelines is unknown.

In *ACLU of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3rd Cir. 1996) (en banc), the Third Circuit found a school board policy unconstitutional that permitted the senior class to vote on whether to include a "prayer" at the high school graduation ceremonies. Again, the only choice in the Third Circuit case was to pray or not to pray.

In *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995), the Ninth Circuit found unconstitutional a similar policy. However, this policy, unlike the one at issue here, provided that the only choice was to pray or not to pray. More consistent with the Guidelines is the Ninth Circuit's case of *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated on other grounds*, 177 F.3d 789 (9th Cir. 1999) (en banc) (vacated for mootness because the student plaintiffs had already graduated). There the Ninth Circuit originally upheld a policy that allowed the top four graduating seniors to deliver non-censored messages where the student could choose to deliver an address, poem, reading, song, musical presentation, prayer, or any other pronouncement, the content of which the student alone controlled. The *Doe* case is similar to *Adler*. However, *Doe* was vacated on grounds of mootness following the graduation of the students.

This Court's recent decision in *Board of Regents v. Southworth*, 120 S. Ct. 1346 (2000), does not conflict with *Adler*. Unlike *Southworth*, this case does not involve a referendum wherein the students have the authority to control the content of the speaker's message. This case involves an election on whether to have a message, the content of which is solely the autonomous decision of the student speaker and not of the student body nor the state.

The Guidelines do not conflict with this Court's recent decision in *Santa Fe Independent School District v. Doe*, 2000 WL 775587 (U.S. June 19, 2000). In *Santa Fe*, this Court repeatedly referenced the history behind the football game policy. That history revealed the October policy grew out of two prior graduation "prayer" policies and one prior football game "prayer" policy. Moreover, the purpose of the Santa Fe policy was to solemnize the game. This Court concluded that prayer was the only logical choice with which to solemnize a football game. Combining this history with the requirement that the invocation be under the "advice and direction of the high school principal", led to the conclusion that the Santa Fe policy gave the student only one choice, that choice being a prayer.

Unlike the policy in *Santa Fe*, the Guidelines in this case do not require that the message be consistent with anything. The stated purpose is to allow students to direct their own graduation ceremony.

There is no advice or direction of the school. The school has no involvement. The outcome of the message is not predetermined. The message is unknown, and is totally up to the student speaker. It be secular, sacred, profane or profound. It can soothe or shock the conscious. It can be jovial or raucous, respectful or offensive. The Guidelines do not create a mechanism for the majority to impose religion on the minority. The Guidelines therefore do not violate this Court's decision in *Santa Fe*.

This case does not at conflict with any other graduation "prayer" case. This case does not involve a graduation "prayer" policy, but instead involves a graduation "speech" policy, the content of which is solely the decision of the student. The vote is not whether to have a prayer, but whether to have a message, the content of which is solely within the discretion of the student. The purpose of the Guidelines is wholly secular. The Guidelines do not endorse religion or foster excessive entanglement with religion. Moreover, the content-neutral Guidelines do not coerce religious belief or practices. The Guidelines are, therefore, consistent with this Court's decisions in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Lee v. Weisman*, 505 U.S. 577 (1992).

If this Court grants the Writ in order to resolve the important issues at stake, this Court should uphold the challenged Guidelines.

I.

CENSORING STUDENT-INITIATED, STUDENT-LED RELIGIOUS SPEECH AT A HIGH SCHOOL GRADUATION WHERE STUDENTS ARE PERMITTED TO DELIVER ANY MESSAGE OF THEIR CHOICE VIOLATES THE FREE SPEECH CLAUSE.

Students on public school campuses retain their rights as private citizens when they enter school property. One of these rights is the right to freedom of speech. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or

expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

Addressing graduation prayer, this Court recognized the following at the conclusion of the majority opinion:

> A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. . . . We recognize that, ***at graduation time*** and throughout the course of the educational process, ***there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.***

Lee v. Weisman, 505 U.S. 577, 598-599 (1992)(emphasis added).

The case represents one of those instances envisioned in *Lee*. The Guidelines create a limited public forum for student expressive activity. Within this forum, students are able to express whatever view they desire without school oversight, supervision, or editorial control. Even in the absence of a limited public forum for student expression, the Petitioners' requested injunction, which requires school intervention in the form of censorship, would, nevertheless, constitute viewpoint discrimination.

A.

Content Censorship of Student-Initiated And Student-Led Religious Speech In A Limited Public Forum Is Unconstitutional.

The Guidelines have created a limited public forum for student expression during graduation ceremonies. The Guidelines state in pertinent part as follows:

> 1. The use of a brief opening and/or closing message not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;

3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

The purpose of these guidelines is to allow the students to direct their own graduation message without monitoring or review by school officials.

The above Guidelines create a limited public forum for student-initiated, student-led messages during graduation, the content of which is under the sole discretion of the student. The student can say a secular or sacred message and may deliver profane or prot[illegible]nd oratory. Under these circumstances, the Board has created a limited public forum for student initiated speech. "To ascertain what limits, if any, may be placed on protected speech, [this Court has] often focused on the place of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). *See also Heffron v. ISKCON*, 452 U.S. 640 (1981); *United States v. Kokinda*, 497 U.S. 720 (1990). "A public forum may be created for a limited purpose such as use by certain groups." *Perry Educational Ass'n. v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 49 n.9 (1983). "A limited public forum is a forum for certain groups of speakers or for the discussion of certain subjects." *Id.* at 591; *see also Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n.*, 429 U.S. 167 (1976).

In determining whether property is a limited public forum there are several relevant factors. *See Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 803 (1985). "The nature of the property and its compatibility with expressive activity provide additional

bearing on intent." *Id.* at 802. "The determination of whether the government has designated a public forum is based upon two factors: governmental intent and the extent of use granted." *Brody v. Spang*, 957 F.2d 1108, 1117 (3rd Cir. 1992)(*citing Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1371 (3rd Cir. 1990)). Courts have recognized that a limited public forum may be created during a graduation ceremony.

> ***If, for example, school officials have authorized students to choose which of them will speak, and have permitted those speakers to select their own topics, including controversial subject matters, then officials may have created a limited public forum.*** Not only would such a practice demonstrate an intent to foster public discourse, but it would avoid attaching the imprimatur of the school to the views expressed in the student's speeches.

Brody, 957 F.2d at 1120 (emphasis added); *see also Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989)(recognizing that a school can create a public forum during the graduation ceremony).

In *Santa Fe Independent School District v. Doe*, 2000 WL 775587 (U.S. June 19, 2000), this Court found that the school board did not create a limited public forum for student speech in part because of the sectarian history of the policy. *Id.* at *5-6. However, this Court also noted that granting "only one student access to the stage at a time does not, of course necessarily preclude a finding that a school has created a limited public forum." *Id.* at *6. In this case, the Board has granted indiscriminate access to more than one student on any topic, even controversial ones.

The Guidelines create a limited public forum during high school graduation. The Guidelines do not prescribe the content of speech. The students have full and unbridled discretion as to whether a message will be included at the event, and, if included, its content. Because the Guidelines allow student speech on any topic, they have created a limited public forum.

It would be completely out of character with the public forum doctrine for the school to allow unbridled discretion for a student to speak on any topic and yet to hold that such a grant of unbridled discretion does not evince an intent to create a limited public forum. Indeed, it is exactly this type of intent that creates a public forum. The state is uninvolved and aloof. The Board neither approves nor disapproves of the content of the speech to be given by the student. The Guidelines are content-neutral. As a matter of fact, the school has no idea what the students will say. Under the Guidelines, it would be just as permissible for a student to say absolutely nothing, or to give a purely secular speech, as it would for the student to deliver a religious message.

Although the *en banc* panel below did not reach the public forum analysis, the *Adler* court analogized the Guidelines "to a long line of open forum cases in which [this] Court has held that neutral secular policies that merely accommodate religion or individual free exercise rights do not amount to an unconstitutional state endorsement of religion." *Adler v. Duval County School Board*, 206 F.3d 1070, 1077 (11th Cir. 2000) (en banc). The *en banc* panel stated that a policy which permits access to both religious and secular student groups or speech in a neutral manner does not violate the Establishment Clause. *Id.* (*citing Widmar v. Vincent*, 454 U.S. 263, 274 (1981)). The *en banc* panel also noted that this Court extended the free speech or open forum analysis to public secondary schools in *Board of Educ. of West Side Community Schools v. Mergens*, 496 U.S. 226 (1990). The *en banc* panel also correctly relied upon this Court's decision in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). The *Adler* Court stated these cases "strongly suggest" that a policy, like the one at issue here, "which provides an opportunity for student-selected, student-initiated private expression through a neutral selection criterion, does not violate the Establishment Clause simply because the venue is equally available for religious or secular expression." *Adler*, 206 F.3d at 1078.

Because the Guidelines create a limited forum for student speech, any content-based restriction on speech in that forum must pass strict scrutiny. Speakers can be excluded from a limited public forum

only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. *See Perry Education Ass'n*, 460 U.S. at 45-46; *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990). "For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end..." *Frisby*, 487 U.S. at 479 (*quoting Perry Education Ass'n.*, 460 U.S. at 49). Exclusion of speech which might be subjectively viewed as "religious" is a content-based restriction that should be countenanced under the First Amendment. Such a content-based restriction runs counter to the idea that "schools are peculiarly the marketplace of ideas." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *see also Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992). Stressing its disdain for content-based prohibitions, this Court stated:

> But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content. [citations omitted]... The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principles that debate on public issues should be uninhibited, robust and wide open."

New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1963)(*quoting Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972)). Content-based regulations of speech constitute "censorship in a most odious form." *Cox v. Louisiana*, 379 U.S. 536, 581 (1965)(Black, J. concurring). Granting an injunction to Petitioners would censor only the "religious" content of student speech.

The "Free Speech and Free Exercise Clauses of the First Amendment require the State to tolerate genuinely student-initiated religious speech in schools." *Chandler v. James*, 180 F.3d 1254, 1258 (11th Cir. 1999). "It is true that ordinarily religious speech by private persons cannot establish religion, even if it occurs in a public institution, such as a school." *Id.* at 1258 (*citing Mergens*, 496 U.S. at 250).

> Permitting students to speak religiously signifies neither State approval nor disapproval of that speech. The speech is not the State's -- either by attribution or adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Chandler, 180 F.3d at 1261. "Because genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." *Id.*

The Court below in *Adler* rejected the notion that "the religious content of any speech at a graduation ceremony is attributable to the school merely because of the school's sponsorship of the event or its control over the graduation's schedule, timing, decorum, or sequence of events." 206 F.3d at 1080. To accept the Petitioners' argument that the students become a mouthpiece of the government would mean that "graduation speakers as diverse as athletes, politicians, academics, entertainers, and maybe even judges would bear the imprimatur of the state because they were hand picked by the school (or, in our case, elected by the senior class) to speak at an event of which the school has great control." *Id.* "It is beyond imagination to say that everyone on the platform at a high school graduation ceremony, including a local politician or celebrity, is a state speaker merely because the state has provided the platform on which private individuals may be invited to share their privately-held views. *Id.*

In the present case, Petitioners request this Court to condone an injunction in the context of a limited public forum that would result in a content-based restriction on speech some bureaucratic censor might deem religious. Such a content-based restriction may not be countenanced by arguing that the students are governmental actors. In *Bethel School District v. Fraser*, 478 U.S. 675 (1986), this Court recognized the distinction between school-sponsored speech and the private expression of students. "It is clear that the mere fact that student speech takes place on school property does not transform it into government speech." *Id.* at 681. In this case, the students are not

government actors, are not acting in concert with the school, and do not seek government support or endorsement of speech. "Religious speech by students does not become forbidden 'state action' the moment the students walk through the schoolhouse door." *Chandler*, 180 F.3d at 1261-62. Indeed, "students are not state actors and, therefore, by definition, their actions cannot tend to 'establish' religion in violation of the Establishment Clause." *Id.* at 1258. Student expression is personal if it is voluntary and not dictated by any individual group. *See Mergens*, 495 U.S. at 226. "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 248. "A student's individual decision to pray or otherwise speak religiously is not the state's command. Such speech is fully protected." *Chandler*, 180 F.3d at 1264 (citations omitted).

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and appearance." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). This Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 760 (1995). This Court has noted that the Establishment Clause is not violated when the State does not sponsor the private religious speech, when the expression is made on government property that has been opened as a forum for speech, and when permission is requested through the same application process and on the same terms required as other speakers. *Id.* at 762. "It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Id.* at 766. "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or limited public forum, publicly announced and open to all on equal terms." *Id.* at 769.

B.

Viewpoint Censorship Of Student-Initiated And Student-Led Religious Speech In A Non-Public Forum Is Unconstitutional.

The Guidelines have created a limited public forum for student expressive activity during graduation ceremonies. Within this limited public forum, the students are free to speak on any topic, secular or sacred, profane or profound. However, even if the Guidelines do not create a limited public forum for student expressive activity, the Petitioners' request for Injunctive Relief is nevertheless unconstitutional, because even in a non-public forum, viewpoint-based discrimination is impermissible. Control over access to a non-public forum can be based on subject matter and speaker identity as long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). This Court has stated the following:

> Although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , ***the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.***

Id. at 806 (emphasis added).

In *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), this Court invalidated a school policy which excluded use of the facilities for religious purposes. This Court ruled that the church's film series dealt with an otherwise includable subject. The film was denied solely because of its religious viewpoint. "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Id.* at 394 (*quoting City*

Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)). This Court also ruled that the Establishment Clause is not violated when property is used for religious purposes under an open access policy. *See Lamb's Chapel*, 508 U.S. at 394-395 (*citing Widmar*, 454 U.S. at 271).

The policy in *Lamb's Chapel* stated that the premises "shall not be used by any group for religious purposes." 508 U.S. at 387. This Court did not decide whether the property was a limited public forum, but instead decided the case on the narrow issue of viewpoint discrimination, which is impermissible even in a non-public forum. *Id.* at 393.

In *Rosenberger*, the University of Virginia used student activity fees to fund a wide range of student newspapers but refused to fund a Christian student newspaper. This Court ruled against the University because it found that the school engaged in viewpoint discrimination.

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not the subject matter, but particular views taken by speakers on the subject, the violation of the First Amendment is all the more blatant. ***Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.***

515 U.S. at 828-29 (emphasis added)(citations omitted).

Viewpoint discrimination is "presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 830. This Court rejected the University's argument that it did not engage in viewpoint discrimination because the guidelines discriminated against an entire class of viewpoints. This Court noted:

> If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.

Id. at 831. "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Id.* at 835. This Court rejected the University's Establishment Clause defense as follows:

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion. . . . We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and even-handed policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. . . . ***More than once we have rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.***

Id. at 839 (emphasis added)(citations omitted).

This Court concluded: "It does not violate the Establishment Clause for a public university to grant access to its facilities on a

religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises." *Id.* at 842.

The *Adler* Court noted "a per se rule that all speech on a state-controlled platform is state speech, raises core free expression concerns and would likely run afoul of the Free Exercise and Free Speech Clauses." 206 F.3d at 1081. The Court noted that even if the graduation ceremony is considered a non-public forum, "students still would possess free speech rights there." *Id.* The *Adler* Court noted that religion is a viewpoint and that student speakers would be expressing various viewpoints, including religious ones. To censor the religious viewpoint would violate the student's free speech rights even in a non-public forum. The *Adler* Court noted that "the Constitution does not prohibit the exercise of offensive speech at graduation ceremonies, religious or otherwise; it only prohibits state expressions of religion." *Id.* at 1081.

An injunction in this case would necessarily be viewpoint-based. Petitioners do not seek the suppression of all speech – only speech of a supposed "religious" viewpoint. An injunction restraining a "religious" viewpoint necessarily asks, "what is religious?" It is beyond dispute that Americans live in a religiously pluralistic society. Therefore, what may not be religious to one individual may be religious to another. Indeed, many religions refer to God differently. For the Islamic, God is "Allah", while for the Buddhist, God is "Buddha." Those of the animist religion believe God resides in certain animals while those of the New Age persuasion believe God resides in and around us like a "force." Secular Humanism, which this Court has defined as a religion, *see Torcaso v. Watkins*, 367 U.S. 488, 495 n.3 (1961), believes that humans are God. Courts have recognized this plurality of religion. *See O'Hair v. Andrus*, 613 F.2d 931, 935 n.19 (D.C. Cir. 1979). It is clear that granting an injunction proscribing "religious" speech would necessarily fail for want of a clear definition of the viewpoint. Is, "May the Force be with you," religious? This type of viewpoint-based restriction would be unduly broad in its scope. In this case the student speech is "not required. Not commanded. Not even suggested. Simply permitted." *Chandler*, 180 F.3d at 1264.

The student speech at issue in this case is student-initiated without any oversight by the Board. Student speech is constitutionally protected even in a nonpublic forum. An injunction requiring censorship of a religious viewpoint is unconstitutional, even in a non-public forum.

II.

THE GUIDELINES ARE CONTENT-NEUTRAL AND COMPORT WITH THIS COURT'S DECISION IN *SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE.*

In *Board of Regents v. Southworth*, 120 S. Ct. 1346 (2000), this Court struck down a student referendum that substituted majority determinations for viewpoint neutrality. This case differs from *Southworth*. In that case the university students had the opportunity to vote on the content of the message. Here the students have no authority to vote on message content.

The Guidelines in this case could not be more different than the policy in *Santa Fe Independent School District v. Doe*, 2000 WL 775587 (U.S. June 19, 2000). This Court in *Santa Fe* repeatedly emphasized the history of the challenged football game policy. It was clear from this history that the school predetermined that the so-called speech would result in "prayer." The October policy in *Santa Fe* was prefaced by a May and July graduation policy that only permitted an "invocation and benediction." *Id. at* 3-4. The August football game policy was patterned after the May and July graduation prayer policies. A vote was taken under the August policy as to whether to have a prayer at football games. When the October policy was passed, the students did not take a new vote. Therefore, despite the October policy that eliminated the word "prayer," the resulting message flowed from the August policy, which was only about prayer.

Moreover, the October policy still used the word "invocation" and stated that the "purpose" of the policy was to "solemnize" the event. The October policy required that *Santa Fe* inject itself into the content of the invocation by demanding that the students, with the "advice and

direction of the high school principal", present a statement or invocation "consistent with the goals and purposes" of the policy. *Id.* at *3 n.6. Since the purpose of the policy was to present an invocation in order to solemnize the event, the *Santa Fe* policy was not content-neutral.

This Court found that the only type of message which was expressly endorsed in the *Santa Fe* policy was an invocation. The expressed purpose of the policy encouraged the selection of a religious message. With this history, this Court noted that the students understood the purpose of the policy was to continue the practice of prayer. Moreover, this Court pointed out several times that the school actually stipulated the vote was whether to have a prayer at varsity football games.

In contrast to *Santa Fe*, the text of the policy states that the purpose of the Guidelines "is to allow the students to direct their own graduation message without monitoring or review by school officials." This purpose is a legitimate secular purpose. The Guidelines do not have the purpose to solemnize graduation.

The Guidelines never mention invocation. Unlike the *Santa Fe* policy which had a fall back provision that would include a nonsectarian and non-proselytizing statement, this policy is wide open with regards to the content of the message. There is no predetermined result. Indeed, in actuality, the only facts before this Court show that of the seventeen high schools, ten had messages with religious content or viewpoint and seven had either no message or the message was entirely secular.

Unlike the *Santa Fe* policy, the Guidelines do not have an impermissible history. These Guidelines follow this Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992). Although the Duval County School Board graduations had a history of prayers at such ceremonies, that history came to an end after *Lee*. The Board could have chosen to adopt the prayer policy upheld by the Fifth Circuit in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992). At the time, the *Jones* decision appeared to continue the practice of prayer through students rather than through outside speakers. However, the Board declined to follow *Jones*, and instead created a limited public forum for student speech.

The Guidelines do not conflict with this Court's recent decision in *Santa Fe*. There is no preferred message and no predetermined result. All messages are treated equally without preference or encouragement of one over the other. Students may give their political, ideological, personal, or religious views on any topic. As such, the Guidelines create a limited public forum for student expressive activity and do not have the impermissible purpose of promoting or endorsing religion.

III.

THE CONTENT-NEUTRAL GUIDELINES WHICH ALLOW UNCENSORED STUDENT MESSAGES DO NOT CONFLICT WITH *LEMON V. KURTZMAN* OR *LEE V. WEISMAN.*

A.

The Guidelines Do Not Violate *Lemon v. Kurtzman.*

The *Lemon* test states that a government regulation must have a secular purpose, its principal or primary effect must not be to endorse or denigrate religion, and it must not foster excessive entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Guidelines do not violate the *Lemon* test.

1. The Purpose Of The Guidelines Is Secular.

The *en banc* panel of the Eleventh Circuit Court of Appeals found that the guidelines have a secular purpose of affording graduating students an opportunity to direct their own graduation ceremony by selecting a student speaker and by allowing free speech on any topic. *Adler v. Duval County School Board*, 206 F.3d 1070, 1085 (11th Cir. 2000)(en banc).

The Guidelines have a secular purpose and are content- neutral toward all student speech. An open forum policy promoting non-discrimination constitutes a valid secular purpose. *See Capitol Square Review Bd. v.* Pinette, 515 U.S. 753 (1995); *Lamb's Chapel v. Center*

Moriches Union Free School District, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Community Sch. v. Mergens*, 406 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). The Establishment Clause is not violated when all speech is treated equally.

This first prong of the *Lemon* test "aims at preventing the relevant decision maker from abandoning neutrality and acting with intent of promoting a particular point of view in religious matters." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

In *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated as moot*, 177 F.3d 789 (9th Cir. 1999)(en banc), the Ninth Circuit affirmed a decision which found that a graduation policy "was motivated, at least in part, by a number of secular purposes, including a desire to grant top students the autonomy to deliver an uncensored speech... unwilling to trivialize the importance of bestowing responsibility on young adults." *Doe*, 147 F.3d at 837. Like this case, in *Doe* the policy simply allowed a student wishing to engage in speech to do so without interference or promotion by the school.

> We conclude that the District's graduation policy survives the *Lemon* test. On its face, the policy has a secular purpose, its primary effect is not the advancement of religion, and it does not excessively entangle church and state... The significant control exerted by the school on the religious contents of the graduation program is missing. Indeed, it is the absence of this control which saves the graduation policy at issue from facial constitutional invalidation.

Id. at 838.

The expressed purpose of the Guidelines "is to allow the students to direct their own graduation message without monitor or review by school officials." The purpose is not religious and is not to solemnize graduation. The expressed purpose of the Guidelines is clearly secular.

2. The Guidelines Do Not Have The Primary Effect Of Advancing Or Endorsing Religion.

The Guidelines evince nothing more than accommodation of student speech. The school does not pre-review or pre-screen the content of the message. The Board has no idea what the students will say before the message is delivered. The Guidelines demand the school to remain neutral toward all speech, secular and religious.

An injunction against the Guidelines would require the government to abandon its content-neutral position and become the final arbiter of what may or may not be considered religious. Such a position would inevitably lead to hostility towards religion rather than a position of neutrality. Thus, the only way the government may avoid an Establishment Clause challenge is to maintain a position of neutrality, not hostility towards religion.

The *Adler en banc* panel found that the Guidelines do not have the primary effect of advancing religion because they are content-neutral and allow a student message on any topic of the student's choice. *See Adler*, 206 F.3d at 1089. The Guidelines "do not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274. Most importantly, "the failure to censor is not synonymous with endorsement." *Mergens*, 496 U.S. at 245. "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.*

The Board has no control over the content of what the students will say, or whether the students will say anything at all. The Board does not have control over who will give the student message. The Guidelines do not mandate prayer or any other speech for that matter, and thus, there is no government delegation in this case. School officials do not supervise the speech of the students.

This Court has stated, "Our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). Indeed, to require the government to remove any vestiges of religion from public

life would violate the Establishment Clause.

> ***The discriminatory suppression of student-initiated religious speech demonstrates not neutrality but hostility towards religion*** because the "exclusion of religious ideas, symbols, and voices marginalizes religion... Silence about a subject conveys a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, culture, and ideological commitment, to exclude all those whose basis is "religious" would profoundly distort public culture.

Chandler v. James, 180 F.3d 1254, 1261 (11th Cir. 1999) (emphasis added)(*quoting* McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 189 (Winter 1992)). In this case, an injunction requiring the government to censor out religious messages from student speech sends a message of hostility forbidden by the Establishment Clause.

3. The Guidelines Do Not Excessively Entangle The Government With Religion.

The *en banc* panel below found that the Guidelines do not excessively entangle the Board with religion because the Guidelines remain facially neutral with respect to religion. *See Adler*, 206 F.3d at 1090.

The Guidelines insulate "the government from the necessity of scrutinizing the content" of the student speech. *Id.* The Guidelines "avoid the need for the state to make religion-based exclusionary judgments." *Id.* The Guidelines also forbid entanglement by stating ***the content of the message shall be prepared by the student volunteer***. This Court has stated that the government would run a greater risk of excessive entanglement by monitoring and censoring religious speech. *See Widmar*, 454 U.S. at 263.

As Justice Souter has remarked, it is hard to "imagine a subject less amenable for the competence of the Federal Judiciary, or more

deliberately to be avoided where possible" than determinations about the religious content of speech. *Lee*, 505 U.S. 616-17 (Souter, J. concurring). *See also Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987)(it is a significant burden to require a religious person or organization "to predict which of its activities a secular court will consider religious"). The Guidelines do not excessively tangle government with religion. An injunction requiring the Board to appoint a bureaucratic censor whose job is to strike through any word deemed religious in a student's speech would create a tangled web between church and state.

B.

The Guidelines Do Not Violate *Lee v. Weisman.*

This Court has stated that government coerces religious belief when the government directs a formal religious exercise by mandating prayer, choosing a clergy for the sole purpose of prayer, and providing guidelines on how to deliver a non-sectarian, non-proselytizing prayer. *See Lee v. Weisman*, 505 U.S. 577 (1992).

Under the facts of *Lee*, this Court found coercion because the school (1) decided that prayer *should* be given, (2) selected a religious speaker to give the prayer, and (3) gave the religious speaker guidelines on how to give a non-sectarian, non-proselytizing prayer. *See Lee*, 505 U.S. at 587. In *Lee*, the "degree of school involvement" made it clear that the graduation prayers bore the imprint of the state. *Id.* at 590. This Court limited *Lee* to its specific facts. *Id.* at 599. The key to the Court's holding in *Lee* was the fact that it was the *school* which coerced the students to participate in a religious exercise. In this case, the Guidelines expressly prohibit involvement from the school in the entire process of selecting the student to deliver the message and in what that student will say. It is impossible under these Guidelines to find that the *state* is coercing a religious exercise. This state involvement in *Lee* is simply not present in the case at bar. The government is in no way mandating prayer, or telling the students how to pray, or that they must pray at all. The government is simply allowing the students to exercise their right to free speech. In *Lee*, Justice Souter stated:

> If the state had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the state. But that is not our case.

Lee, 505 U.S. at 630 n.8 (Souter, J., concurring).

The *en banc* panel below stated it was clear that the issue of the selection of the messenger and the content of the message, as found problematic in *Lee*, was not present here. *See Adler*, 206 F.3d at 1080. The Court noted that "a graduation free of all religious expression, compelled by the school's sponsorship of the event, is not required by the Establishment Clause." *Id.* The Court below stated that the "focus must be on whether the state has endorsed the message in an appreciable manner, which, when combined with the inherent nature of the graduation ceremony, obliges students to participate in a religious exercise." *Id.* at 1083. The Court found no coercion in this case because "neither the Duval County schools nor the graduating senior classes even decide if a religious prayer or message will be delivered, let alone 'require' or 'coerce' the student audience to participate in any privately-crafted message." *Id.* at 1083. The Court stated it would not assume that Duval County seniors "will interpret the school's failure to censor a private student message for religious content as an endorsement of that message - - particularly where students are expressly informed as part of the election process that they may select a speaker who alone will craft any message." *Id.* The Court also rejected the suggestion that the speaker would have a desire to placate the majority as highly speculative, and noted that "the scant record before us suggests an opposite conclusion." *Id.* The Court noted that while ten of the graduation messages delivered pursuant to the Guidelines involved some sort of religious content, the other seven Duval County graduations either had no student message or a wholly secular message. *Id.* The *Adler* Court noted that no "religious result is preordained under the policy" and consequently, no coercion exists. *Id.* at 1084.

Indeed, in the case of student-initiated religious speech, the fact that we live in a religiously pluralistic society demands respect for

others' private religious speech. *Lee*, 505 U.S. at 637-638 (Scalia, J., dissenting).

There is simply no coercion present in the Guidelines because the only thing the Guidelines accomplish is to allow private student-initiated speech. Such speech cannot constitute governmental coercion of religious belief. The Guidelines present a different set of facts than *Lee*, and do not result in governmental coercion of religious belief.

CONCLUSION

This case does not conflict with other circuits, nor does it conflict with any ruling from this Court. Respondents-Intervenors contend that the *en banc* panel correctly decided this case. However, if this Court grants the Writ in order to resolve the important issues at stake, this Court should uphold the challenged Guidelines.

Respectfully submitted,

Jerry Falwell, Jr.
Va. Bar No. 27396
LIBERTY COUNSEL
P.O. Box 542
Forest, VA 24551

Mathew D. Staver
(Counsel of Record)
Florida Bar No. 0701092
Erik W. Stanley
Florida Bar No. 0183504
LIBERTY COUNSEL
210 East Palmetto Avenue
Longwood, Florida 32750
(407) 875-2100